EXHIBIT A

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Dckt No. 88 – Declaration of Derek A. Newman in Support of Defendants' Motion to Compel Discovery of Testimony About Settlements

The Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JAMES S. GORDON, Jr., a married individual, d/b/a 'GORDONWORKS.COM'; OMNI INNOVATIONS, LLC., a Washington limited liability company, Plaintiffs, v. VIRTUMUNDO, INC, a Delaware corporation d/b/a ADNOWLEDGEMAIL.COM; ADKNOWLEDGE, INC., a Delaware corporation, d/b/a ADKNOWLEDGEMAIL.COM; SCOTT LYNN, an individual; and JOHN DOES, 1-X, Defendants.	NO. CV06-0204JCC **DECLARATION OF DEREK A. NEWMAN IN SUPPORT OF DEFENDANTS' MOTION TO COMPEL DISCOVERY OF TESTIMONY ABOUT SETTLEMENTS** NOTE ON MOTION CALENDAR: January 26, 2007 CONFIDENTIAL INFORMATION

I, Derek A. Newman, declare and testify as follows:

1. I am over eighteen years of age, counsel for defendants in the above captioned action, competent to testify to the matters stated in this declaration, and make this declaration from personal knowledge of those matters.

2. On January 9, 2007 and January 10, 2007, Defendants deposed Plaintiff James S. Gordon, Jr. ("Gordon") in the above-captioned lawsuit. True and correct copies of relevant portions of Gordon's deposition transcript (in rough draft form) are attached

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as **Exhibit A** hereto.

I certify and declare under the penalty of perjury under the laws of the State of Washington and the United States that to my knowledge the foregoing is true and correct.

Executed on this 11th day of January, 2007, at Seattle, Washington.

Derek A. Newman

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Dckt No. 88 – Exhibit A to Declaration of Derek A. Newman in Support of Defendants' Motion to Compel Discovery of Testimony About Settlements

EXHIBIT A

Excerpts from Draft Deposition Transcript

Transcript of Rough Draft

Case:

Date: January 9, 2007

BUELL
REALTIME REPORTING, LLC
Leaders in Realtime Technology

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cutoff was.
Q. Why did those unemployment compensation payments cease?
A. I don't know. I have no idea. Unless -- you know, there's only a certain amount of time that you can qualify, and I'm assuming that was the case.
Q. Were you employed in the year 2004?
A. I had no employer.
Q. Did you own a business in the year 2004?
A. Omni was the only thing that technically was formed. I kept renewing the license for it each year.
Q. Did Omni generate any revenue in 2004?
A. No. I don't believe -- no. I don't believe it did.
Q. I just want to clarify.
I used the term "revenue." I suppose a synonym for that would be income, and I just want to make sure you understand that when I ask, I'm inquiring as to whether Omni generated any income whatsoever, gross net, in kind.
A. I would have to double-check because I did ask an accountant for help who actually was one of the professors at city U, so I would have to go back to whatever notes to say -- I don't think so, but I'm not absolutely positive. I don't think at that time it did.
Q. In 2004, did you earn any income other than from unemployment compensation from the State?

A. Did I earn any other income?
I held no job during that period of time.
Q. In 2004, did you earn any income other than from unemployment compensation from the State?
A. As I understand that, the answer is no.
Q. In 2005, did Omni generate any revenue or earn any income of any kind?
A. I think -- I think the first revenue for Omni was 2006.
I lost a lot -- in fact, I lost all of my records due to computer viruses on at least three occasions. And I've had to, I guess, decentralize recordkeeping.
Q. In 2005, did you earn any income?
A. I'm trying to think if I did any workshops.
I don't recall anything at this point for '05?
Q. During these years when you were unemployed, how did you pay your bills?
A. Well, I mentioned that my wife was working.
During the course of the last maybe two and a half years, the lawsuits that I have been involved with yielded settlements.
Q. You testified earlier that in 2006, Omni earned its first revenue.
A. Yes.
Q. What from what source did Omni earn its first revenue?

A. The first revenue came from a settlement.
Q. A settlement of what?
A. A settlement of a lawsuit.
Q. What lawsuit?
A. I -- I think that agreement's confidential, best -- I'm not supposed to divulge that information.
Q. Are you refusing to answer the question?
A. At this point, yes.
MR. NEWMAN: Would the court reporter be so kind as to mark the record. ^ .
Q. You understand that I'm entitled to ask any question that's likely to lead to the discovery of admissible evidence, correct?
A. Yes.
Q. And here, I'm asking a question that directly relates to this case because it involves another lawsuit you brought.
Do you understand that?
A. Yes, I do.
Q. And I believe I have the right to ask this question.
Why aren't you answering it?
MR. SIEGEL: Counsel, objection. To the extent that my client may be bound by confidentiality provisions in a particular settlement agreement, then we would request time and opportunity to consult and review that -- those provisions, and we will answer if we believe that we're obligated to and you're

entitled to that information and my client doesn't run afoul of the confidential provisions.

MR. NEWMAN: In this case, we have a protective order, and we agreed to it and the court signed off on it. We negotiated it.

MR. SIEGEL: That's true.

MR. NEWMAN: And it provides for when in this case the parties should disclose confidential information and how that will be maintained.

May I ask this question of this witness pursuant to the protective order and we could ask the court reporter to maintain the confidentiality of this portion of the record?

THE WITNESS: It's okay?

MR. SIEGEL: I guess so.

We do have a protective.

THE WITNESS: Okay --

MR. NEWMAN: I just want to make clear for the record -- and court reporter's doesn't like this very much, but we have a very good one here.

At this point, the portion of the record should remain confidential, and then, when we're done with the areas that you would like protected pursuant to the protective order, please let me know so that we can go back onto a regular transcript so as not to inconvenience the stenographer any further.

A. Okay.

Q. You testified that in 2006, Omni received revenue and, specifically, the source was settlement from a lawsuit.
What was that lawsuit?
A. Oh. I apologize. That's not the case.
No, it wasn't from settlement of a lawsuit. I just recalled, it was not.
Q. Let's go on the record such that it will not be confidential at this point, okay?
A. Okay.
Q. What -- from what source did that revenue come that Omni earned in 2006?
A. May I consult with my attorney?
Q. Not unless you believe the question that I'm asking you may infringe upon the attorney-client privilege.
MR. SIEGEL: You can answer the question.
THE WITNESS: This was the REDACTED matter.
It's okay?
MR. SIEGEL: Yeah.
With that said, we're going to have this portion marked as confidential pursuant to the protective order.
MR. NEWMAN: That's fair.
If the court reporter has any questions about the confidentiality, please let us know, because I anticipate we'll be doing this from time to time throughout the day.
A. Okay. Mr. Newman, the situation was no lawsuit was

filed. We negotiated a settlement with a company. We didn't file a lawsuit against, and that was REDACTED.

Q. What is REDACTED?

A. Part of a network of companies that sell REDACTED items all over the world. They're based in REDACTED or REDACTED REDACTED

Q. In 2006, did you have a dispute with REDACTED ?

A. I think the dispute started in '05.

Q. Okay.

And what was the nature of that dispute?

A. This was regarding spam that I assumed to be illegal.

Q. What is spam?

A. Well, there's a couple of definitions on the Internet.

Spamhaus, I think, does the best job. I haven't memorized that.

Spam, perhaps, is just another term for unsolicited commercial e-mail. Sometimes I think it's called unsolicited bulk e-mail.

Anyway, a couple of terms like that. And just -- maybe it's a pejorative term. Maybe that's the best way to characterize it.

E-mail that comes to the e-mail box that the person doesn't want, it's not desired. It typically doesn't stop. It's kind of what I received from defendants.

Q. And REDACTED on behalf of REDACTED apologized for sending you the e-mail, right?

A. That's correct.

Q. But you still received the e-mails, correct?

A. That's correct.

Q. Did you ask REDACTED or anyone else from REDACTED why you were receiving e-mails after you had asked them to stop?

A. I'm sure we did. We continued to talk from June of '05 through maybe Christmas of '05, and I kept sending her e-mail to show her that it was still coming to me.

Q. Did she explain why REDACTED was still sending you messages?

A. I'm not sure if she did or not. She just talked about her technical people working on it to try to correct the problem.

Q. How did you resolve that dispute?

A. It didn't resolve because they continued.

Q. But in 2006, you entered into some type of agreement, correct?

A. Yes. That's true.

Q. What was the nature of that agreement?

A. I don't understand that.

Q. What were the terms of the agreement?

A. I don't know. We have copies, if it's necessary to provide that.

Q. Did they agree to stop sending e-mail to you?

A. I believe so, yes.

Q. And did they stop sending e-mail to you?

A. I haven't been looking specifically for that, but I think they have.

Q. And did they pay you money?

A. Yes.

Q. How much money did they pay you?

THE WITNESS: What was the amount?

MR. SIEGEL: We're still marking this entire line of answers as confidential.

THE WITNESS: Do you recall?

MR. SIEGEL: If you don't, I don't want you to testify to anything you don't recall. Only if you recall.

A. I would have to see the agreement again. I apologize.

Q. You have no idea?

Can you estimate?

A. That wouldn't be the truth if I estimated, so -- I'm just not certain.

Q. You testified earlier that neither you nor your company had earned any revenue until this settlement.

And based upon that testimony, I find it surprising that you don't remember at all how much money was paid to you.

MR. SIEGEL: Objection. Argumentative.

Q. If I give you a moment, do you think that you could think about it and provide an estimate?

A. I'm not going to try now. I'm still -- I'm really quite tired.

Q. Why don't we take a break, and get some water, fresh air --

A. I'm talking about lack of sleep type tired. I only slept maybe four hours last night.

MR. SIEGEL: I could use a few minutes.

MR. NEWMAN: Let's take five minutes. We'll give the court reporter a break and you can get some fresh air and we'll resume.

THE VIDEOGRAPHER: The time is now 10:20 a.m. We are off the record.

(A recess was taken.)

THE VIDEOGRAPHER: The time is now 10:44 a.m. We are on the record.

Q. After the break, but before we went on the record, I discussed with your lawyer that you're uncomfortable answering questions concerning settlement agreements that are confidential. And we made an effort to call the court to seek the court's guidance on the subject.

The court has a clerk who indicated that the court will call us back. At this juncture, we don't have that guidance.

I'm going to continue asking you questions, and I want to understand this.

There's certain questions you're going to refuse to answer; is that right?

A. Yes.

Q. And those are limited to questions about settlements of previous lawsuits; is that right?

A. That's true.

Q. Are you going to refuse to answer questions about the lawsuits that you have filed?

A. I don't know at this point.

Q. Before we took our break, you were testifying about a settlement with REDACTED; is that right?

A. Yes.

Q. You alleged that REDACTED -- in fact, I think you told me they even agreed -- had sent you e-mail that you didn't want to receive, right?

A. That's true.

Q. How many e-mail messages?

MR. SIEGEL: Counsel, I thought we agreed that you were going to reserve this line until we get a court order, because we are under confidential with REDACTED as well.

So I think we should -- I think you should resume this line once -- if you get a court order requiring my client to disclose the confidential information.

Q. Is the amount of e-mails that you received from REDACTED provided as confidential under an agreement?

A. I don't know. I don't know.

I depend on Bob and/or Doug McKinley to interpret that type of information. I don't know.

MR. SIEGEL: To the extent that you want to ask -- I guess I'll just identify those areas that I think are -- you know, it's the terms of the settlement agreement, obviously, that are confidential. So if you want to ask fact-based questions about the claim, that's line. If you know.

THE WITNESS: Okay.

MR. SIEGEL: To the extent you know.

And I'll also put an objection in based on relevance, not likely to lead to the admissibility of evidence.

Q. I'm going to return to the subject matter we were just discussing later.

A. Okay.

Q. I'm hoping that we will hear from the court and we will receive that guidance that we were discussing.

In the year 2006, did you earn any revenue or income that was not as a result of a settlement of a dispute?

A. No.

Q. It is now 2007, and we're only in the -- I believe second week.

A. Yes.
Q. Have you earned any revenue or income this year whatsoever?
A. I think it's your term "earned" that gives me pause.
No, is the short answer to that.
Q. Have you generated any income or revenue this year?
A. No.
Q. Did you generate any income or revenue in the year 2006 other than from settlements of disputes?
A. No.
Q. You testified that my use of the term "earned" gave you pause.
A. Uh-huh.
Q. I want to make sure my questions are clear.
What gave you pause about that term?
A. Well, "earned" is something I associate with a job, where you go in, you get a paycheck or salary and wages.
Q. When I use the term "generate," is that clearer?
A. It's broader.
Q. Have you obtained any income or revenue in the year 2006 or 2007 other than from settlements and disputes?
A. No.
Q. You testified in the year 2003, you filed a lawsuit pro se against Mr. Hansson; is that correct?
A. Yes.

Q. Is that the first lawsuit you ever filed?
A. I'm not sure about the sequence of lawsuits. There were three filed in December of '03.
Q. You were the plaintiff in each?
A. Yes.
Q. Specifically, James Gordon, Junior?
A. I'm not sure.
Q. Do you know whether Omni was a plaintiff in any of those lawsuits?
A. I don't believe so.
Q. The three lawsuits that you testified about filed in 2003, were they separate case numbers?
A. Yes.
Q. One lawsuit was against Mr. Hansson, correct?
A. That's true.
Q. And do you remember what that lawsuit was called; in other words, Gordon vs. --
A. No, I don't.
Q. What were the other two?
A. In terms of defendants?
Q. Yes.
A. American Homeowners Association and Commonwealth Marketing Group.
Q. How did the lawsuit between you and American Homeowners Association resolve?

A. Doug McKinley sent in to the court a -- I don't know what it's called, but it's a document saying that this lawsuit is dismissed with prejudice. That's my understanding of how they did it.

Q. Did you enter into a settlement agreement with American Homeowners Association?

THE WITNESS: Bob, is that part still under the protective order that we've been talking about?

MR. SIEGEL: Yeah. To the extent that this is about any of your settlement --

THE WITNESS: In terms of terms?

MR. SIEGEL: Well, I just want all of this marked ads confidential under the protective order.

THE WITNESS: Okay.

A. Yes.

Q. I was under the understanding that this wasn't confidential. I understand that if we ask about the nature of the settlement agreement, at this juncture, you refuse to testify about it. And if the court orders that you should testify, I understand that will be confidential.

A. Then I will.

Q. The fact that I'm asking about lawsuits that were filed publicly indicates to me that it shouldn't be confidential.

MR. SIEGEL: Well, this is the problem, Counsel.

Since I was not involved in most of these settlements, I don't know what the terms are, so I can't counsel my client what the confidentiality -- exactly as to the scope of the confidentiality provisions in each settlement agreement.

So with that said, I will designate all of this line of questioning about any of these lawsuits as confidential and you can, under the protective order, you have the right to dispute that at any time.

MR. NEWMAN: Very well.

MR. SIEGEL: And maybe if you ask later, I might say fine, use it.

But for now --

MR. NEWMAN: Understood. The record is clear. And I can confer off the record later and work through the issue.

MR. SIEGEL: Okay.

Q. Understanding that your counsel is designating this as confidential -- which hopefully should ease your comfort level -- was there a settlement agreement between you and American Homeowners Association?

A. Yes.

Q. Did American Homeowners Association pay you any money?

A. Yes.

Q. How much money?

MR. SIEGEL: Okay. That's going to be -- we're going to wait for a court order on that part.

Q. How many e-mails did you allege American Homeowners Association -- strike that question.
Was the lawsuit against American Homeowners Association as a result of you receiving e-mails?
A. Yes.
Q. Did you allege that American Homeowners Association had sent you e-mails in violation of a statute?
A. Yes.
Q. How many e-mails did you allege you received from American Homeowners Association?
A. I don't recall. I don't recall.
Q. Do you have any idea?
A. No.
Q. More than 10?
A. I don't recall a number. I don't recall.
I would only be guessing, so I don't know what the number was.
Q. When I ask you questions, I understand that sometimes it's difficult to guess or estimate. I'm entitled to your best estimate.
Let me give you an example of what that means.
If I ask you how much money is in your bank account -- I'm not going to ask that question, but if I did -- you probably don't know the exact amount.
A. Okay.

segregate it such that the user would never receive the message, correct?

A. I don't know that.

Q. Will you used any other spam filters other than MailWasherPro and SpamAssassin?

A. I tried to use spam -- oh, boy. A company in Albuquerque sells it.

Spam -- it just slipped my mind that quickly.

It will probably come to me.

It has the SpamCrime feature in it, but the actual name of the software, I'm not positive.

But, yes, I've tried another one.

Q. What?

(Telephone interruption.)

MR. NEWMAN: There's a telephone call coming in.

Hello?

THE CLERK: This is -- from Judge Coughenour's chambers.

Do I have the deposition?

MR. NEWMAN: Yes. This is Derek Newman, and I'm here with Bob Siegel. I represent the defendants and Mr. Siegel represents the plaintiffs.

THE CLERK: Okay. I discussed this with the judge, and he's going to decline to order plaintiff to answer these questions, and if defendant would like to continue seeking these answers, then you should file a motion to compel and the judge will consider it after full briefing.

But he didn't want to do anything on it in this sort of cursory manner.

So if you want to try and get these questions answered by the plaintiff, then file a motion to compel deposition inquiry into this matter and then depending on how this comes out, there would be an opportunity for a supplemental deposition of whoever you're deposing right now.

MR. NEWMAN: Very well.

So, to clarify what you've advised, the court's declining to grant the relief that we seek now, but we can file a motion to compel even though the deadline for discovery motions has passed, the court will consider that motion, and if granted, then we can take further deposition to the extent that the order provides.

THE CLERK: Correct.

MR. NEWMAN: Thank you very much.

THE CLERK: You're welcome.

MR. NEWMAN: Good-bye.

THE CLERK: Bye.

Q. You testified earlier that you used an ISP called One World?

A. One World Telecommunications. OWT for short.

Q. When was OWT your ISP?

of e-mails. So I don't know what that's going to finally look like.

Q. The receipt of spam benefits you, correct?

MR. SIEGEL: Objection. Mischaracterizes testimony. He told you exactly --

MR. NEWMAN: I didn't quote his testimony and you're coaching your witness. If you want to object to the form of the question, you should.

MR. SIEGEL: It's a leading question snow speaking objection is improper and coaching the witness is improper.

MR. SIEGEL: Leading question is improper. That's not what he testified to.

MR. NEWMAN: Leading question is not improper I'm cross examining this witness. Leading objection is the most proper proper question that one can ask on cross examination.

I'm going to ask the question again, I would appreciate it if you do not coach the witness. We have a record here.

MR. SIEGEL: That's fine. Don't let him put words in your mouth, Jim.

THE WITNESS: Okay.

MR. NEWMAN: Would the court reporter be so kind as to repeat the question.

(The requested testimony was read.)

A. I answered slightly different.

Yes insofar as research and yes insofar as there have been settlement agreements for people who have said that they wouldn't spam me any longer.

Q. Is there anything in paragraph 16 of Exhibit 15 that you're unsure of today?

A. We'll leave it as is.

Q. The answer is no?

A. Yes.

Wait a minute.

There's nothing, so, no.

Q. Exhibit 15, paragraph 16 talks about the proper use of from names in the from line.

Do you see that?

A. Oh, I thought we were on 17. Let me go back.

Okay. Yes, I see it.

Q. What is the proper use of from names in the from line?

A. Identify the sender.

Q. And upon what information do you base the testimony that that's the proper use of the from name?

A. Federal trade commission and canned spam, in my estimation, as a layman, both say that that's the proper use.

Q. Any other source?

A. I may have read other things.

Q. What has the federal trade commission said about the proper use of a from name in the from line?

me e-mails that are unsorted in lots of 10 to 50,000 at one time."
Do you see that?
A. Yes.
Q. Why do your clients send you e-mails?
A. They know that I'm in the business of trying to reclaim our collective domain, so to speak.
Q. Why do they send you e-mails?
A. Well, they know it's going to be part of the litigation.
I am the Internet access service, and as the Internet access service, they know that there is part of the statute that speaks to -- the Internet access service is knowing that the statutory penalty, if you will, says that Internet access services are -- I don't know what the word is -- entitled or -- to statutory damages in the amount of $1,000 for each offense.
So they know that as Internet access service, they know about my research. They know all that. And they know about my litigation, so they send it to me.
In fact, I have one in my car right now.
Q. What do you have in your car right now?
A. A disk with tens of thousands of e-mails on it from a client.
Q. Why is it in your car?
A. Because she gave it to me last night.

Q. Which client is that?
A. Emily Abbey. She lives on Queen Anne.
Q. Do your clients share in any recovery -- and by that term, I mean settlement or judgment -- that you obtain in any litigation that you brought?
A. Yes.
Q. And how do you determine the amount that they will earn in connection with the settlements or judgments that you obtain?
A. I'm not sure exactly how we came to it.
I'm not sure just how that came about. I don't know if we had a meeting or how we ended upcoming up with the exact formula, so to speak.
Q. Is it a percent?
A. Yes.
Q. What is the percent?
A. It depends on how many people have e-mails from that particular defendant.
Q. Do you know how many people have e-mails from Adknowledge or Virtumundo?
A. Not offhand, no.
Q. Have you determined, if you recover in Virtumundo and Adknowledge, who will share in that recovery?
A. No is the short answer, but that's not wholly correct, I don't think.